Supreme Court, U.S.
FILED

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(1)

No.

In The

Supreme Court of the United States

October Term 1997

ANNA HINKEL,

Petitioner,

v.

CURTIS R. HINKEL AND
PRUDENTIAL INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTION PRESENTED.

What extent of wrongdoing by the named beneficiary of a SGLIA policy is necessary to change the apparent outcome under Ridgway v. Ridgway, 454 U.S. 46, 102 S.Ct. 51, 70 L.Ed.2d 39 (1981) which indicates that a named beneficiary must always be paid the proceeds of a SGLIA policy except in a case of breach of trust or fraud?

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PETITION FOR WRIT OF CERTIORARI

Anna Hinkel respectfully asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion and judgment of the Eight Circuit of Appeals dated July 30, 1997 has not been reported to date. A copy of the opinion is reproduced in the Appendix attached to this Petition (App 1a-10a). The Order of the United States District Court for the Northern District of Iowa, Western Division, was made by the United States District Court for the Northern District Iowa on September 26, 1996. A copy of that order is reproduced in the Appendix at (App. 11a-35a). The District Court opinion was not reported.

STATEMENT OF JURISDICTION

The jurisdiction for writ of certiorari is grounded in that the United States District Court for the Northern District of Iowa, had jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

The ruling of the Eighth Circuit Court of Appeals was filed on July 30,1997. The jurisdiction of the Supreme Court to review the decision of the Eighth Circuit Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 10(1) (c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There are no constitutional provisions involved in this matter. The statutes and rules involved are 28 § 1331, 28 § 1254, Supreme Court Rule 10(1) (c), 38 § 1965, and Federal Rule of Civil Procedure 22. Pertinent text of provisions of the statutes and rules are set out in Apps. 28a through 36a.

STATEMENT OF THE CASE.

Complaint for interpleader and declaratory relief was filed in the United States District Court for the Northern District of Iowa, Western Division, on November 22, 1995, by Plaintiff, Prudential Insurance Co. of America. The action involved the claim for benefits under a Servicemen's Group Life Insurance Act (SGLIA) Title 38 U.S.C. § 1965, et. seq.

The Plaintiff, Prudential Insurance Company of America, indicated that distribution of proceeds under SGLIA is governed by Federal Law 38 U.S.C. § 1970, 1975. The United States District Court had jurisdiction over this matter, pursuant to 28 U.S.C. § 1331.

The complaint alleged that the Prudential Insurance Company of America is a corporation organized under the laws of the State of New Jersey with its principal office or place of business being in Newark, New Jersey, and both Defendants are residents of Sergeant Bluff, Woodbury County, Iowa.

The Plaintiff acknowledged that the sum of $200,000.00 is to be paid under Group No. G-32000, but

that the Plaintiff was confronted with adverse and conflicting claims to the proceeds of the policy. The Plaintiff desired pursuant to Federal Rule of Civil Procedure 22 to deposit with the Clerk of Court the sum of $200,000.00, plus interest from the date of death. The Plaintiff alleged that they are an innocent and impartial stakeholder and desires that the District Court decide which of the two conflicting claimants, Defendant Curtis R. Hinkel, or Defendant Anna Hinkel, a minor, is the proper payee of the above mentioned sum of money by reason of the death of Gail Hinkel. Hearing was held on Motion for Summary Judgment and the District Court ruled on September 26, 1996 awarding the proceeds of the SGLIA policy in question to Defendant Anna Hinkel, a minor.

The District Court found that the facts of the case called for different result than that indicated in the opinion issued in *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 51, 70 L. Ed.2d 39 (1981) in that Curtis R. Hinkel was not an "innocent recipient" as was Sgt. Ridgway's surviving spouse, Donna.

The District Court found that unlike Donna Ridgway, Curtis R. Hinkel clearly intended that the proceeds of the policy were intended to belong to the minor child and that Curtis Hinkel agreed and promised in the divorce action between Curtis and Gail Hinkel that his daughter was entitled to the proceeds.

The District Court further found that Curtis Hinkel did his best to persuade Gail Hinkel, the policyholder and his ex-wife, not to change the beneficiary from him to his daughter. The District Court was persuaded that because of these factors *Ridgway* did

not apply and ordered that the proceeds to be paid to the minor child, Anna. The Eighth Circuit reversed stating that "Appellee's attempt to distinguish *Ridgway* is of no avail. As clearly stated in *Ridgway*, the only way to change the beneficiary under the SGLIA is to communicate that decision in writing to the proper office." (App. 7a)

The Court of Appeals for the Eighth Circuit also stated that the facts as found by the District Court "is not the type of fraud contemplated by *Ridgway* as presenting an extreme fact situation which might cause an exception to the holding in *Ridgway* 2" (App. 8a)

Argument

Curtis and Gail Hinkel were married and had one child, Anna Hinkel, who is now five years old. In the fall of 1993, Curtis and Gail Hinkel were divorced. The terms of the divorce decree required each party to keep $250,000.00 in life insurance on themselves for the benefit of the minor daughter, Anna Hinkel. The following additional provision was contained in the Stipulation of Dissolution adopted by the Iowa District Court in the Decree incorporating same:

> "9.1 Each of the parties will execute an deliver to the other party any documents that may be reasonably required to accomplish the intent of this instrument and shall do all other things incident to this end. In the event either party fails to comply with the provisions of this paragraph within thirty (30) days hereof, this Agreement shall constitute an actual

> grant, assignment and conveyance of the property and rights in such manner and with such force and effect as shall be necessary to effectuate the terms of this Agreement . . ." (App. 6a)

Gail died in August, 1995, and had not changed the named beneficiary from what it had been prior to the dissolution, that being her former husband, Curtis Hinkel. Both parties made claims to the policy proceeds; Curtis on the holding of *Ridgway v. Ridgway, 454 U.S. 46, 102 S.Ct. 51, 70 L. Ed.2d 39 (1981)* and Anna based on the exception in the *Ridgway* for a different result if there was a breach of trust.

Rather than pay either of the two competing claims of the policy proceeds, Prudential filed a complaint for interpleader in the United States District Court for the Northern District of Iowa (Western Division). This claim for interpleader and declaratory relief was under the authority of F.R.C.P. 22. Prudential further indicated that the District Court had jurisdiction over the matter pursuant to 28 U.S.C. § 1331 and the disposition of proceeds under SGLIA as govern by 38 U.S.C. § 1970, 1975.

The district court found (App. 18a) that the *Ridgway* opinion is not dispositive because of the major factual differences between *Ridgway* and the instant case. The district court reasoned that the designated beneficiary in the *Ridgway* matter, being Sgt. Ridgway's second wife, Donna, was an "innocent recipient", i.e. a person who had no direct connection to the child or children claiming the policy benefits. The Court found that the actions of Curtis Hinkel in claiming the proceeds

of the policy as his own after expressing an intent that the proceeds should go to the child were inconsistent with being an "innocent recipient". The trial court further found that in a situation such as presented here where an individual who is a party to a dissolution action promises in the dissolution action that if the appropriate documents to change a beneficiary of a SGLIA policy were not executed within thirty days of the decree, then the decree shall operate as an actual assignment and conveyance of the property (as Curtis has in the instant case) then that person is a "wrongdoer" and not an "innocent recipient". (App. 21a).

Ridgway **does indicate that the holding in** ***Ridgway*** **is not a holding which controls in all situations.** ***Ridgway*** **does differentiate between the holding in** ***Ridgway*** **and situations were a breach of trust is present. This is best illustrated by the following:**

> **"Here, in contrast, Sgt. Ridgway's conduct did not amount to a breach of trust or conversion of another's propertyand we are not inclined to provide or infer such an allegation when a case comes to us, as this one does, with a record of nothing more than a breach of contract on the part of the deceased service member."**

Ridgway v. Ridgway, 102 S.Ct. 49, 57 (1981).

Clearly, the findings of the district court in this case were well beyond a breach of contract on part of the deceased service member, unlike Sgt. Ridgway and Donna Ridgway, Curtis Hinkel and Gail Hinkel were parents of a minor child, whose interests both parents addressed in

the Stipulation. The district court found that Curtis Hinkel was a party to divorce proceedings which clearly mandated that the child shall be the recipient of the SGLIA proceeds, and Curtis Hinkel cannot be perceived to be an "innocent recipient". (App. 23a). The district court also found that the evidence showed Curtis Hinkel did his best to persuade Gail Hinkel not to change the beneficiary from him to their minor daughter. (App. 23a). The District Court also found that there was clear and convincing evidence that the policy benefits were intended for Anna Hinkel and that Anna Hinkel should be entitled to those proceeds. (App. 23a). This finding amounts to the creation of an express trust. There having been an express trust created, then Curtis' doing his best to persuade Gail not to change the beneficiary and claiming the proceeds as his own amounts to a breach of trust.

This case is not a situation where a serviceman changes a beneficiary after a dissolution proceedings, but this is a situation where a beneficiary agrees in a dissolution proceeding that another should have legal title to the proceeds and then seeks to make the proceeds his own personal property.

It is clear that the actions of Curtis Hinkel amount to a breach of trust. It is also clear that the actions of Curtis and Gail Hinkel in signing the stipulation of dissolution created a trust as illustrated in 76 Am Jur 2d Trust § 65:

> **"To create an express trust there must be not only an intent to create an express trust but also a proper manifestation of such**

> **intent. In this regard, the use of formal words is not required to create a trust, instead, all that is required is that manifest intention be found that another person shall have the benefit of the property in question."**

Additionally, 72 Am Jur 2d Trust § 77 states as follows:

> **"It is not necessary to use any express or any particular form of words in order to create an express trust. In this regard, when a question arises as to whether an agreement creates a trust, the courts look objectively at the result to determine the matter, and no particular form of words or conduct are necessary to the creation of a trust. All that is required is that a manifest intention be found that another person shall have the benefit of the property in question. Thus, while the intent to create a trust must be apparent, and the use of technical words may be advisable to indicate intent to create a trust, their use is not necessarily conclusive of the creation of a trust."**

This would show that there was a trust created and the breach of same would have been the personal claim by Curtis Hinkel of the funds.

***Ridgway* and cases related to *Ridgway* all focus on the conduct of the policyholders. What we are concerned with here is not only the act of the policyholder but also**

the acts of the beneficiary. The beneficiary and policyholder did act together in agreeing to the Stipulation and this situation is addressed in Restatement 2d Trusts § 84, Interest Subject to be Divested comment (b) Life Insurance, wherein it is stated:

> **"If a person takes out a policy of insurance upon his life payable to a third person, the rights of the third person as beneficiary of the policy can be held in trust even though the insured reserves power to change the beneficiary of the policy. The trust may be created either by the insured or by the beneficiary of the policy. Thus, a trust is created whether the beneficiary of the policy is designated as trustee in the policy or whether the policy is payable to him without mention of any trust <u>but he agrees with the insured to hold the policy or its proceeds in trust for a designated person</u> ." (Emphasis added.)**

This would show that an express trust can be created when a person is designated as a beneficiary in a life policy and by separate document does agree that he holds this interest for the benefit of another. This would seem to be the situation addressed in the *Ridgway* exception. Obviously, the situation here goes much further than a breach of contract on the part of the deceased service member.

CONCLUSION

The District Court found that Curtis Hinkel was not an "innocent recipient" as Donna Ridgway was, and that he would fit the definition of a "wrongdoer". The breach of trust found here is sufficient to award the proceeds to the minor child. The Court of Appeals for the Eighth Circuit has decided an important question of federal law (to what extent must wrongdoing be before the breach of trust or fraud exception to the general rule of *Ridgway* applies) that has not been, but should be, settled by this Court.

The Court of Appeals for the Eighth Circuit found that wrongdoing as found by the District Court was not sufficient by saying "the evidence presented in this case is not the type of fraud contemplated by *Ridgway* as presenting an extreme fact situation which might cause an exception to the holding of *Ridgway* 2" (App 8a). The Court of Appeals apparently relies on footnote 9 of the *Ridgway* opinion on page 57 of 102 S.Ct. as being the law and that the wrongdoing by the named beneficiary must reach the level of murder for *Ridgway* not to apply. "In *Ridgway*, the Supreme Court did recognize that it was not addressing 'the legal aspects of extreme fact situations or instances where the beneficiary has obtained the proceeds through fraudulent or illegal means as, for example, where the named beneficiary murders the insured service member." (App. 8a). In fact, footnote 12 on Page 59 of 102 S.Ct. leaves open an important question of federal law as it is stated there "we intimate no view as to whether wrongdoing by the named beneficiary would change the outcome." The breach of trust found here is sufficient to award the proceeds to the minor child.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument has been delivered by first class mail on October 26, 1997 upon counsel listed below:

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Nos. 96-3684/3770

Prudential Insurance Company,

Plaintiff,

v.

Curtis R. Hinkel,

Appellant/Cross-Appellee,

Anna Hinkel, a minor,

Appellee/Cross-Appellant.

Appeals from the United States District Court for the Northern District of Iowa.

Submitted: June 11, 1997

Filed: July 30, 1997

Before LOKEN and LAY, Circuit Judges, and FENNER,1 District Judge.

1 The Honorable Gary A. Fenner, United States District Judge for the Western District of Missouri, sitting by designation.

FENNER, District Judge.

Appellant, Curtis R. Hinkel, appeals the judgment of the District Court which granted summary judgment in favor of appellee2, Anna Hinkel. The judgment of the District Court is reversed and this cause remanded with directions that summary judgment be granted in favor of appellant.

The underlying cause is an interpleader action brought by Prudential Life Insurance Company of America (Prudential). Prudential initiated this action in regard to a life insurance policy it had issued to Gail Hinkel in the amount of $200,000, pursuant to the Servicemen's Group Life Insurance Act, Title 38 U.S.C. § 1965 (SGLIA). At the time of the policy's issuance, Gail Hinkel listed her husband, Curtis Hinkel, as beneficiary. Subsequent to Gail's designation of Curtis as beneficiary, the Hinkels were divorced. Upon dissolution of their marriage, Curtis and Gail Hinkel were granted joint custody of their minor child, Anna Hinkel, the appellee herein. In the dissolution

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2 Appellee, Anna Hinkel, references herself in this appeal as appellee/cross appellant. However, in her brief on appeal, Anna Hinkel fails to challenge the judgment of the District Court in any respect and asks that said judgment be affirmed. Anna Hinkel presents no issues for review which challenge the judgment of the District Court and requests no relief from the judgment as required under FRAP 28(a)(7). Anna Hinkel is an appellee only and not a cross appellant.

proceeding, Curtis and Gail Hinkel entered into a Stipulation for Dissolution of Marriage, which was incorporated by the Decree of Dissolution. In this stipulation the parties agreed, among other matters, that each would maintain a life insurance policy on their life of at least $250,000, naming Anna Hinkel as the sole beneficiary. After the dissolution of her marriage, without changing the beneficiary of her SGLIA policy from Curtis to Anna, Gail Hinkel died.

Upon Gail's death, Curtis made claim to the SGLIA policy proceeds as his own property. Rather than pay Curtis, Prudential filed the petition in this cause as a stakeholder of the policy, and asked the Court to decide whether Curtis Hinkel or Anna Hinkel would be the proper payee.

The issues presented came before the District Court on appellant's motion for judgment on the pleadings which was later converted to a motion for summary judgment with the consent of counsel for the parties herein. In its order, the District Court found Curtis Hinkel "bound by the stipulated Dissolution of Marriage Settlement Agreement and court ordered Decree of Dissolution which, together, clearly mandates the child should be the recipient of the proceeds." The District Court determined appellee, Anna Hinkel, to be the beneficiary of the policy holding that under Iowa law a constructive trust should be imposed on the proceeds of the policy, and finding among other matters that Curtis Hinkel had exercised undue influence.

STANDARD OF REVIEW FROM SUMMARY JUDGMENT

"In reviewing a decision of a district court to grant summary judgment we must apply the same strict standard as the district court. . . [O]ur review is therefore do novo." Robinson v. Monaghan, 864 F.2d 622, 624 (8th Cir. 1989). A court should grant summary judgment if "there is no genuine issue of material fact" and "the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c). The burden is on the movant to establish the absence of a material fact issue by identifying portions of the pleadings, depositions, answers to interrogatories, admission on file, and affidavits. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." FED.R.CIV.P. 56(e). One of the principle purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses and the rule should be interpreted in a way that allows it to accomplish this purpose. Celotex Corp. v. Catrett, 477 U.S. at 323-24. However, in ruling on a summary judgment motion, the Court views the facts in the light most favorable to the nonmoving party and allows that party the benefit of all reasonable inferences to be drawn from the evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

APPEAL

On appeal, appellant Curtis Hinkel argues that he is entitled to judgment as a matter of law relying

chiefly on the decision of the United States Supreme Court in Ridgway v. Ridgway, 454 U.S. 46 (1981). We agree.

In Ridgway, Sergeant Ridgway and his first wife were divorced and he was ordered to keep in force the insurance policies on his life for the benefit of the three children of the marriage. After his remarriage, Sergeant Ridgway changed the beneficiary designation on his SGLIA policy from his first wife, April, to his second wife, Donna. Both April and Donna filed claims for the proceeds of the policy. April's claim was on behalf of the children, pursuant to the divorce decree. The Supreme Judicial Court of Maine held that Donna must hold the policy proceeds as constructive trustee on behalf of the children. The United States Supreme Court reversed the decision of the Supreme Judicial Court of Maine. Ridgway, 454 U.S. at 63.

In Ridgway, the Supreme Court held that a state divorce decree, like other law governing economic aspects of domestic relations, must give way to clearly conflicting federal enactments as a necessary consequence to the supremacy clause. Ridgway, 454 U.S. at 54-55. The Supreme Court further held that the controlling provisions of SGLIA, under which an insured service member possesses the right freely to designate a beneficiary and to alter that choice at any time by communicating the decision in writing to the proper office, prevail over and displace inconsistent state law. Ridgway, 454 U.S. at 55.

The imposition of a constructive trust in favor of Sergeant Ridgway's three children by former marriage, in accordance with a state court divorce decree, upon

proceeds of an insured's SGLIA policy was found to be inconsistent with the SGLIA's antiattachment provision, 38 U.S.C. § 770(g). Ridgway, 454 U.S. at 60. Therefore, any diversion of an insured's SGLIA policy by means of a court-imposed constructive trust which is contrary to the insured's beneficiary designation so that the policy proceeds are to be paid to someone other than the beneficiary at the time of the insured's death, operates as forbidden "seizure" of those proceeds. Ridgway, 454 U.S. at 60.

Appellee, Anna Hinkel, attempts to distinguish this case from Ridgway by arguing that the language in the Stipulation of Dissolution in the case at bar created an express trust. The relevant language in the case at bar provides as follows:

> 3.9 The Husband and Wife shall each maintain a policy of life insurance on their life of at least $250,000 and the minor child shall be named as sole beneficiary of both the Husband and Wife's policies.
>
> 9.1 Each of the parties will execute and deliver to the other party any documents that may be reasonably required to accomplish the intent of this instrument and shall do all other things incident to this end. In the event either party fails to comply with the provisions of this paragraph within thirty (30) days hereof, this Agreement shall constitute an actual grant, assignment and conveyance of the property and rights in such manner and with such force and effect as shall be necessary to effectuate the terms of this Agreement. The titles appearing in each

numbered paragraph at the commencement thereof shall not be construed or considered as part of the body of this Agreement but shall be considered as general identification only of the contents of the respective paragraphs.3

Appellee argues that in Ridgway, there was no language in the divorce decree similar to paragraph 9.1 above declaring "an actual grant, assignment and conveyance of the property and rights in such manner and with such force and effect as shall be necessary to effectuate the terms of this agreement."

Appellee's attempt to distinguish Ridgway is of no avail. As clearly stated in Ridgway, the only way to change a beneficiary under the SGLIA is to communicate that decision in writing to the proper office. Ridgway, 454 U.S. at 53. This was never done by Gail Hinkel. To allow a change of beneficiary by other means would be contrary to the terms established by Congress as addressed in Ridgway.

Furthermore, SGLIA was intended by Congress to be construed the same as the Federal Employees Group Life Insurance Act (FEGLIA). Mathews, 926 F.Supp. 650, 652 (citing Stribling v. United States, 419 F.2d 1350, 1353 (8th Cir. 1969)). It has been consistently held in regard to FEGLIA that a divorce decree cannot operate as a waiver or restriction of an insured's right to change the beneficiary when federal regulations conflict. See, Metropolitan Life Insurance Company v. Christ, 979 F.2d 575 (7th Cir. 1992); Dean

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3 The parties do not dispute that this language adequately references the SGLIA policy in question.

v. Johnson, 881 F.2d 948 (10th Cir. 1989) cert. denied, 493 U.S. 1011 (1989); Metropolitan Life Insurance Company v. McMorris, 786 F.2d 379 (10th Cir. 1986); Metropolitan Life Insurance Company v. McShan, 577 F.Supp. 165 (N.D. Cal. 1983); Knowles v. Metropolitan Life Ins. Co.,, 514 F.Supp. 515 (N.D. Ga. 1981); Mathews v. Mathews, 926 F.Supp. 650 (N.D. Ohio 1996).

Additionally, appellee argues that the record in the case at bar supports the finding of the District Court that appellant, Curtis Hinkel, exerted undue influence on his ex-wife in regard to her not changing the beneficiary on her SGLIA policy. Anna argues this establishes an exception to the general principles of Ridgway.

In the case at bar, the District Court relying on Iowa law found that Curtis Hinkel had exercised undue influence in regard to Gail not changing the beneficiary of her SGLIA policy from Curtis to Anna. In Ridgway, the Supreme Court did recognize that it was not addressing "the legal aspects of extreme fact situations or of instances where the beneficiary has obtained the proceeds through fraudulent or illegal means as, for example, where the named beneficiary murders the insured service member." Ridgway, 454 U.S. at 57. However, the evidence presented in this case is not the type of fraud contemplated by Ridgway as presenting an extreme fact situation which might cause an exception to the holding of Ridgway, nor is it even sufficient to establish undue influence under Iowa law.

In determining that there was undue influence in the case at bar, the District Court relied on the case of

In re Matter of Estate of Welch, 534 N.W.2d 109 (Iowa App. 1995). In In re Welch, the Court of Appeals of Iowa stated, in pertinent part, as follows:

> Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that the person will not act in a manner inconsistent with his or her welfare. Restatement (Second) of Contracts § 177 (1981). The ultimate question is whether the result was produced by means that seriously impaired the free and competent exercise of judgment. Id., § 177 cmt. b; See Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179 (Iowa App. 1986). There are four elements necessary to sustain a finding of undue influence. They are: (1) the grantor's susceptibility to undue influence; (2) opportunity to exercise such influence and effect the wrongful purpose; (3) disposition to influence unduly for the purpose of procuring an improper favor; and (4) a result clearly the effect of undue influence. Pence v. Rawlings, 453 N.W.2d 249, 252 (Iowa App. 1990).

In re Matter of Estate of Welch, 534 N.W.2d at 112.

The only evidence of undue influence presented to the District Court was an affidavit from Gail Hinkel's mother, Connie Loftus.4 In her affidavit, Ms. Loftus stated that after Gail's dissolution from Curtis, Gail

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4 The record reflects that the affidavit was received in evidence without objection by appellant.

stated to her as follows:

> ". . . that [Gail] had not changed the beneficiary form to date. [Gail] indicated that she didn't know if she was going to based on the fact that Curtis had told her that it would be better for Anna if it was left as is and not changed."

The affidavit of Connie Loftus does not establish a result which was clearly the effect of undue influence. Curtis and Gail Hinkel were divorced which circumstance did not establish a relationship where Gail would be justified in assuming that Curtis would act in a manner consistent with her welfare. The affidavit is also clearly insufficient to establish that Gail's free and competent exercise of judgment was seriously impaired by Curtis. Even considering the evidence in the light most favorable to appellee and allowing appellee the benefit of all reasonable inferences to be drawn from the evidence, we find that there is no genuine issue of material fact and that appellant is entitled to judgment as a matter of law.

The judgment of the District Court is reversed and this cause is remanded with directions that summary judgment be entered in favor of Curtis Hinkel.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

No. C95-4122-DEO

**PRUDENTIAL INSURANCE CO.
OF AMERICA,**
Plaintiff,

vs .

**CURTIS R. HINKEL, and
ANNA HINKEL, A MINOR**
Defendants.

ORDER

This interpleader matter comes before the Court on a number of motions. Both defendants argue that each, individually, should be awarded the $200,000 proceeds. The Court orders that the proceeds are the property of the daughter Anna Hinkel, a minor, by reason of a constructive trust. The plaintiff has filed a motion for attorney fees; the defendant Curtis Hinkel has filed a motion to dismiss on the pleadings and a motion requesting that the plaintiff pay both defendants' attorney fees; and the defendant Anna Hinkel has filed a motion for attorney fees to be paid from the interpleader fund, an order nun pro tunc, and a crossclaim against the defendant Curtis Hinkel. The Court has carefully considered the pleadings of the parties and is persuaded that, since there are no factual questions raised by the parties, this case can be disposed of without any further hearings .

I. FACTS

Curtis and Gail Hinkel were married and had a child, Anna Hinkel, who is now four years old. In late 1993, Curtis and Gail Hinkel divorced. The terms of the divorce decree required both parties to keep $250,000 life insurance policies on themselves payable to their daughter Anna. Thereafter, Gail Hinkel died. Gail Hinkel had not changed the named beneficiary of the life insurance policy that she kept on herself when she was married to Curtis Hinkel and when she died her former husband Curtis Hinkel was still the designated beneficiary of her life insurance policy.[1] Curtis Hinkel, rather than agree that Gail Hinkel had continued to keep the policy for the benefit of the daughter Anna Hinkel, now claims that he is the rightful beneficiary of Gail Hinkel's life insurance policy. Prudential Insurance Company of America wrote the policy insuring Gail Hinkel's death. Rather than pay the policy benefits to either the father Curtis or the daughter Anna Hinkel, Prudential elected to file this interpleader action asking the Court to determine which defendant should have legal right and title to the policy's benefits.

Under normal circumstances, Gail Hinkel's error might be easily reconcilable. This case, however, is not normal due to the type of life insurance Gail had. Gail served in the United States military and kept a federal government-affiliated life insurance policy whose terms

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[1] It also turns out that Gail only had $200,000 of insurance because she did not increase her policy coverage from the $200,000 level she kept when she was married, to the $250,000 level she was required to keep by the terms of the divorce decree

are governed by the Servicemen's Group Life Insurance Act (SGLIA), 38 U.S.C. §§ 1965, *et. seq.*

This statute creates federal jurisdiction.

II. LEGAL ANALYSIS

Both defendants agree that Ridgway v. Ridgway, 454 U.S. 46 (1981), is an important case for the Court to consider. Curtis Hinkel argues that Ridgway is dispositive of any claim Anna Hinkel has to the life insurance proceeds resulting"from her mother Gail Hinkel's death. Anna Hinkel argues that while Ridgway presents issues similar to the issues in this case it is not controlling here.

@ In Ridgway, Army Sergeant Ridgway was granted a divorce from his first wife April. The divorce decree ordered that Sergeant Ridgway maintain the life insurance policies that he kept on his own life for the benefit of his three children produced by his union with April. At the time he divorced April, Sergeant Ridgway held a $20,000 life insurance policy that he purchased through the Prudential Life Insurance Company of America pursuant to the Serviceman's Group Life Insurance Act of 1965. After divorcing April, Sergeant Ridgway married a woman named Donna and changed the beneficiary on his SGLIA policy making the proceeds payable "by law." Later, Sergeant Ridgway died. The proceeds of his life insurance were payable "by law" and Maine law dictated that, absent some other indication, a surviving spouse takes the proceeds from the deceased spouse's life insurance policy. Sergeant Ridgway was survived by Donna, April, and his three children from his

marriage to April. New wife Donna claimed the proceeds of Sergeant Ridgway's life insurance policy in her name; April claimed the same proceeds in the name of her children. A Maine district court considered April's state law constructive trust argument and Donna's federal law SGLIA statutory argument. The district court ruled that the United States Constitution's Supremacy Clause gave precedence to federal law and awarded the policy proceeds to Donna. The Maine Supreme Court reversed the lower court's holding and adopted April's constructive trust argument. Ridgway v. Prudential Ins. Co. of America, 419 A.2d 1030 (Me. 1980).

The United States Supreme Court accepted certiorari of the Maine Supreme Court's decision and, after consideration of the issues, reversed the Maine Supreme Court. The United States Supreme Court relied on Wissner v. Wissner, 338 U.S. 655 (1950), and Free v. Bland, 369 U.S. 663 (1962), for the proposition that, when a member of the armed services designates a beneficiary of an SGLIA policy, "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." Ridgway, 454 U.S. at 55 (citing Wissner, 338 U.S. at 658). The Ridgway Court described the Wissner holding as "strong words and a positive ruling." Id. The Ridgway court concluded that their case was controlled by Wissner and 38 U.S.C. §§ 717(a)[2], 770(a)[3] and 770(g)[4] which, together, guaranteed

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[2] 38 U.S.C. § 717(a) read: "The insured shall have the right to designate the beneficiary or beneficiaries of insurance maturing on or after August 1, 1946, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries."

that an "insured service member possesses the right freely to designate the beneficiary and to alter the choice at any time by communicating the decision in writing to the proper office." Id. at 56 (citing Wissner, 338 U.S. at 658). The Supreme Court concluded that Congress had the power to change the manner in which SGLIA policies operate, "Thus far, however, Congress has insulated the proceeds of SGLIA insurance from attack or seizure by

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In 1991, Pub.L. 102-83 recodified this statute at 38 U.S.C. § 1917 (a).

[3] 38 U.S.C. § 770(a) read: "Any amount of insurance under this subchapter in force on any member or former member on the date of the insured's death shall be paid, upon the establishment of a valid claim therefor, to the person or persons surviving at the date of the insured's death, in the following order of precedence: First, to the beneficiary or beneficiaries as the member or former member may have designated by a writing received prior to death . . . in the uniformed services if insured under Servicemen's Group Life Insurance . . . ." In 1991, Pub.L. 102-83 recodified this statute at 38 U.S.C. § 1970(a).

[4] 38 U.S.C. § 770(g) read: "Payments of benefits due to or to become due under Servicemen's Group Life Insurance or Veterans' Group Life Insurance made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before of after receipt by the beneficiary." In 1991, Pub.L. 102-83 recodified this statute at 38 U.S.C. Sec. 1970 (g).

any claimant other than the beneficiary designated by the insured . . . ." Id. at 63.

If Ridgway is the last clear word on these matters, this Court would be inclined to abide by it and find for the defendant Curtis Hinkel. There are, however, two dissenting opinions in Ridgway. In addition, there is a Supreme Court case that takes exception to Ridgway.[5] This Court is persuaded that it must consider these opinions.[6] First, the Court reviews Justice Powell's spirited dissent in Ridgway where he was joined by Justice Rehnquist. Justice Powell wrote,

> In my view, the Court is plainly wrong in concluding that Richard's conduct was "nothing more than a breach of contract" and that his obligation was like that of "any commercial" debtor who defaults on a judgment. Familial obligations are not merely commercial. Few legal duties are more universally acknowledged than the duty of a father to support his children .

Ridgway, 454 U.S. at 67-68 (Powell, J., dissenting) (footnotes and internal citations omitted) . Justice Stevens also dissented. He wrote,

> Although Wissner left open the question presented in this case, there is nothing in the language of the SGLIA or its legislative history that evidences an intent by Congress to repudiate

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[5] See, infra Rose v. Rose, 481 U.S. 619 (1987)

[6] The Eighth Circuit has yet to comment on the issue in Ridgway. It has only mentioned the case in passing.

> this distinction between commercial and family obligations . . . . Claims based on familial obligation, however, are of a different character [than commercial obligations], and indeed may be precisely the type of claim for which the federal benefit was intended. Absent some indication that Congress intended the standard exemption provision contained in the SGLIA to bar a minor child's claim for support, I am unwilling to conclude that this provision of the statute pre-empts the application of state law in this case.

Id., at 78-79 (Stevens, J., dissenting) (footnotes and internal citations omitted) .

Rose v. Rose, 481 U.S. 619 (1987), came to the Supreme Court on review of a state court decision that ordered a veteran to use a portion of his disability benefits to make his child support payments. It was filed six years after Ridgway. The Supreme Court upheld the decision because the state court or"der did not conflict with or preempt the federal law that governed veterans' disability benefits. In Rose, The Supreme Court discussed, distinguished and limited Ridgway, notwithstanding the fact that the veteran's disability compensation statute contained an anti-attachment provision identical in all respects to the one[7] relied on in Ridgway.

In addition, Justice O'Connor criticized the Ridgway decision in Rose. She wrote,

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[7] 38 USC. § 770(g).

> In short, the support obligation has always been granted a special place in our law. While the broad language of § 3101 (a) seems clearly meant to bar the ordinary creditor's attachment, I cannot find, in light of this Nation's common law tradition, that the language of § 3101(a) expresses anything like the unequivocal congressional intent necessary to bar family members from enforcing the veteran's support obligation. *The contrary holding in ~ is hopelessly anomalous, and should be relegated to the status of "a derelict on the waters of the law."* Lambert v. California, 355 U.S. 225, 232, 78 S.Ct. 240, 245, 2 L.Ed.2d 228 (1957) (Frankfurter, J., dissenting) .

Id. at 629 (O'Connor, J., dissenting) (emphasis added). It seems clear that Justice O'Connor, who did not participate in Ridgway, would vote to overturn Ridgway today. From the Ridgway and Rose dissents, it is apparent that three of the current nine Supreme Court Justices (Rehnquist, Stevens and O'Connor) oppose the holding in Ridgway. The other six current Justices were not on the Supreme Court when Ridgway was decided.[8] Even if one could brush aside the hefty moral weight of Justices Rehnquist Stevens and O'Connor's dissents, judicial mathematics alone calls Ridgway into question.

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[8] Since Ridgway, only one other Justice currently serving on the Supreme Court has had an opportunity to rule on this issue. In Rose, Justice Scalia indicated he would support the holding in Ridgway. Rose, 481 U.S. at 641 (Scalia, J., concurring in part and concurring in judgment) .

The extent to which the validity of Ridgway is dubious, however, is not controlling here. The question is not controlling because this Court agrees with the defendant Anna Hinkel who argues that Ridgway is not dispositive of this case because there are, as she points out, major factual differences between Ridgway and the instant case. As mentioned, in Ridgway, Sergeant Ridgway was required by the divorce decree to designate his children as the beneficiaries of the SGLIA policy. Instead, he designated his second wife Donna as the beneficiary. Whatever one may think of Ridgway's second wife's decision to keep the proceeds of the Sergeant's life insurance policy, it cannot be said that Donna was a party to, or bound by, Sergeant Ridgway and April's divorce decree. Donna was, for lack of a better term, an "innocent recipient" of the life insurance proceeds. By accepting the money that Sergeant Ridgway assigned to her in the policy, Donna violated neither the letter nor the spirit of any judicial order obligating her.

The facts in the case at hand are quite different. The service member who died, Gail Hinkel, had not assigned her SGLIA policy proceeds to an "innocent recipient," i.e., a person who had no direct connection to the child or children claiming the policy benefits. Instead, prior to the divorce, Gail Hinkel had assigned the policy proceeds to Curtis Hinkel, the natural father of Anna Hinkel. He was a party to the divorce action. He was and is bound by the Stipulated Dissolution of Marriage Settlement Agreement and court-ordered Decree of Dissolution which, together, very clearly mandate that the child shall be the recipient of the proceeds.[9] He cannot be

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[9] **Pertinent paragraphs in the "Stipulated Dissolution of Marriage Settlement Agreement" are**

paragraphs 3.9, 7.2, 8.1 and 10.1. They read as follows:

> 3.9. The Husband and Wife shall each maintain a policy of life insurance on their life of at least $250,000 and the minor child shall be named as sole beneficiary of both the Husband and Wife's policies.
>
> 7.2. Each of the parties expressly certifies that they have entered into this agreement upon mature consideration; that consent to the execution of this Agreement has not been obtained by duress, fraud, or undue influence of any person; that no representations of fact have been made by either party to the o"ther except as herein expressly set forth; and that the parties agree that this Agreement is fair and reasonable .
>
> 8.1. This Agreement and the provisions thereof rest upon valuable consideration moving from each of the parties hereto to the other, and it shall be binding upon each of the parties and shall be enforceable by either party in any court in any manner prescribed by law.
>
> 10.1. No waiver of any breach by either party of the terms of this Agreement shall be deemed a waiver of any subsequent breach. No modification of the Agreement shall be binding upon either of the parties unless reduced to writing and subscribed to by both parties, unless ordered by Court.

A pertinent paragraphs in the "Decree of Dissolution" states:

perceived as an "innocent recipient." This is a major factual difference and it alone is enough to distinguish the instant case from Ridgway Curtis Hinkel urges the Court that, as a result of Gail Hinkel's action or inaction, he should be granted license to purloin his daughter's inheritance. As unpalatable as was the result in Ridgway, the result that Curtis Hinkel urges in this different factual case is unquestionably more shocking to the conscience, i.e., where Dad in court agreed and promised that his daughter was entitled to the proceeds. Because the instant case differs significantly from Ridgway, this Court is persuaded that Ridgway is not controlling here.

The Court now turns to the defendant Anna Hinkel's argument that the benefits of her mother Gail Hinkel's life insurance policy should be held in a constructive trust for her benefit. The Iowa Supreme Court recently discussed constructive trusts. That court held,

> A constructive trust is a remedial device by which the holder of legal title is held to be a trustee for the benefit of another who in good conscience is entitled to the beneficial interest. It is an equitable doctrine applied for purposes of restitution, to prevent

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED

by the Court that the stipulation made and entered into between the Petitioner and the Respondent which is now on file in this case and set forth hereinbefore, is hereby approved and adopted in its entirety by the Court and is by this reference made a part of this Decree the same as if set out in full herein.

> **unjust enrichment. Constructive trusts fall into three categories: (1) those arising from actual fraud; (2) those arising from constructive fraud (appropriation of property by fiduciaries or others in confidential relationships); and (3) those based on equitable principles other than fraud. Other circumstances supporting imposition of equitable principles include bad faith, duress, coercion, undue influence, abuse of confidence, or any form of unconscionable conduct or questionable means by which one obtains the legal right to property which they should not in equity and good conscience hold.**

Estate of Welch v. Estate of Welch, 534 N.W.2d 109, 111 (Iowa 1995) (citations omitted) (emphasis added). This Court is persuaded the language emphasized in the above quotation is relevant to this case.

A further review of constructive trust cases in Iowa shows there is precedent for the type of trust which Anna Hinkel seeks. In fact, Estate of Welch involved a situation somewhat similar to the Hinkels' case. George Welch had only been married to his third wife Dorothy for about eight months. Just prior to his death, George, with Dorothy's help, transferred large sums of money and financial instruments to Dorothy and to him and Dorothy as joint tenants. Even though George and Dorothy had a prenuptial agreement, George rewrote his will just prior to his death so that Dorothy would receive more than she would have received under the previous will. George's daughter from his first marriage, Patricia, sought some of the money that Dorothy was to receive from the estate.

The Court held that Dorothy had exerted undue influence over George and remanded the case to the district court for the creation of a constructive trust in Patricia's name. Id. at 113. Estate of Welch shows that the manner in which Anna Hinkel asks the Court to use a constructive trust is precedented in Iowa. The evidence of undue influence might not be as strong in our present case, but the evidence showed that Curtis Hinkel did his best to persuade Gail Hinkel not to change the beneficiary from him to their daughter. From our evidence, it cannot be said that Curtis' actions persuaded Gail, but it can be concluded that it certainly was a factor.

From Estate of Welch, the question the Court must answer becomes, "Is there some form of unconscionable conduct or questionable means by which Curtis Hinkel seeks to obtain the legal right to the proceeds from Gail Hinkel's life insurance policy which he should not in equity and good conscience hold?" The answer is clearly, "Yes." Curtis Hinkel would take from his daughter her inheritance to fill his own pockets relying on no equity or fairness and little other than Ridgway. There is clear and convincing evidence that the policy benefits were intended for Anna Hinkel and that Anna Hinkel should have title to those proceeds. Curtis Hinkel's actions are not appropriate under the circumstances. The Court recognizes that unlike in Ridgway, Curtis Hinkel did not change his beneficiary, but that it was his former wife Gail who didn't do as she had agreed. However, this court is persuaded that despite Ridgway the present United States Supreme Court would not allow a party, here Curtis Hinkel, to personally handsomely profit by trying to torpedo the very clear intentions and words of the settlement agreement and the Decree of Dissolution to which he was a party. He clearly

fits perfectly into paragraph three of Estate of Welch. The Court is persuaded that it should create a constructive trust into which the proceeds of Gail Hinkel's SGLIA policy will be placed.

Fifty years ago this year, Dr. Benjamin Spock wrote,

> The more people have studied different methods of bringing up children the more they have come to the conclusion that what good mothers and fathers instinctively feel like doing for their babies is the best after all.

Spock, Benjamin, The Common Sense Book of Baby and Child Care, ch. 1 (1st ed. 1946). From this, the Court concludes one of two things, either human nature has changed greatly in the last half century, or Mr. Hinkel disobeyed his instincts and went for greed when he challenged his daughter's right to the proceeds of her mother's life insurance policy. The Court suspects and very much hopes -- the later is true.

III. ATTORNEY FEES

The plaintiff Prudential Insurance Company has asked the Court for an attorney fees award to be paid from Gail Hinkel's life insurance proceeds. The plaintiff submitted its bill to the Court and documented 80.6 hours or $9.223.50 in hourly fees and $228.60 in expenses for a grand total of $9,452.10." At the recent hearing in this case, both defendants Anna and Curtis Hinkel objected to the amount of the plaintiff's request for attorney fees. The defendant Curtis Hinkel also filed a motion requesting that the Court require the plaintiff to pay both

defendants' attorney fees due to the plaintiff's delay in filing the life insurance proceeds with the Clerk of Court.

The law is clear that attorney fee awards for the plaintiff in an interpleader case can be made at the Court's discretion. See, e.g., Life Ins. Co. of North America v. Nava, 667 F.Supp. 279, 280 (M.D.La. 1987). At the recent hearing, the plaintiff's counsel explained that part of the delay in filing the proceeds was attributable to the Clerk of Court's reluctance to accept such a large check. Even if this is true, the Court is not persuaded that the plaintiff should be made to pay the defendants' attorney fees.

The Court is not persuaded that the plaintiff is entitled to the entire fee that it requests. Ultimately, the plaintiff called on the Court to decide who should receive the life insurance proceeds. Given that the plaintiff decided to deposit the funds, the Court wonders why the plaintiff did not reach this decision a few thousand dollars sooner. The Court notes that on November 16, 1995, the plaintiff shows that it billed for revising and editing the interpleader draft. At this point the plaintiff had worked only 33.9 hours. This seems to have been an appropriate time to stop work on the case. After all, when the decision to file interpleader is made, little work remains for the stakeholder. The Court will give the plaintiff the benefit of the doubt and award the plaintiff half the attorney fees it requests and all of its expenses. This award amounts to $4840.35 from the funds on deposit.

The minor defendant Anna Hinkel has also filed a request for attorney fees to be paid for from the interpleader fund. At the recent hearing, the plaintiff and the defendant Curtis Hinkel both agreed that the

defendant Anna Hinkel's counsel should be paid his fees from the fund. The Court is also persuaded that it is appropriate to reimburse Anna Hinkel's court-appointed guardian ad litem who is also acting as her attorney in this Court for his work with money from the interpleader fund.

The Court cannot set an appropriate amount of attorney fees until Anna Hinkel's counsel files his billing statement with the Court. The Court also notes that the defendant Curtis Hinkel has only requested that the plaintiff pay his attorney fees, and has not requested that his attorney fees be reimbursed from the interpleader fund. The Court is persuaded that it would be appropriate for Curtis Hinkel's counsel to be reimbursed his fees from the fund because the Ridgway case presented a fairly clear problem to the Court. The Court cannot set an appropriate amount of attorney fees until Curtis Hinkel's counsel files his billing statement with the Court and the other parties have the opportunity to comment thereon.

IV. OTHER MATTERS

The Court notes that the defendant Anna Hinkel has also filed a cross-claim against the defendant Curtis Hinkel and a motion for an order nun pro tunc. The purpose of the nun pro tunc filing would allow him to receive attorney fees and costs from the date of his first involvement in this case, December 13, 1995. This motion is sustained. This ruling of this Court renders moot his cross claim.

Upon the foregoing,

IT IS HEREBY ORDERED that the proceeds of the life insurance policy ($200,000) deposited with the Clerk of Court, less any deductions for attorney fees and/or costs ultimately approved by the Court is the property of Anna Hinkel, a minor. Counsel for her shall make appropriate arrangement in the Iowa state courts so that the remainder of the proceeds can be deposited to an appropriate account to be supervised all as set out by the laws of Iowa.

IT IS HEREBY FURTHER ORDERED that the plaintiff's attorneys shall receive $4840.35 for their services in this case. The Clerk of Court shall not pay this amount to the plaintiff until specifically ordered to do so by this Court.

IT IS HEREBY ORDERED that the defendant Anna Hinkel's attorney may file a billing statement for his services in this case. This may be resisted and, if necessary, the Court will hold a hearing on this issue.

IT IS HEREBY ORDERED that the defendant Curtis Hinkel may file a claim for his legal services incurred in this case. This may be resisted and, if necessary, the Court will hold a hearing on this issue.

IT IS FURTHER ORDERED that the interpleader proceeds at issue in this case, less all attorney fees the Court eventually awards, shall held in trust by the Clerk of Court until further order of this Court.

IT IS FURTHER ORDERED that Curtis Hinkel's motion to dismiss and any other pending motions are denied.

Dated this 26th day of September, 1996

Donald E. O'Brien, S.J.
USDJ

28 § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

•(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States

Supreme Court Rule 10 (1)(c)

a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

38 § 1965. Definitions

For the purpose of this subchapter -

•(1) The term "active duty" means -
•(A) full-time duty in the Armed Forces, other than active duty for training; •(B) full-time duty (other than for

training purposes) as a commissioned officer of the Regular or Reserve Corps of the Public Health Service; •(C) full-time duty as a commissioned officer of the National Oceanic and Atmospheric Administration; and •(D) full-time duty as a cadet or midshipman at the United States Military Academy, United States Naval Academy, United States Air Force Academy, or the United States Coast Guard Academy.

•(2) The term "active duty for training" means - •(A) full-time duty in the Armed Forces performed by Reserves for training purposes; •(B) full-time duty for training purposes performed as a commissioned officer of the Reserve Corps of the Public Health Service; •(C) full-time duty as a member, cadet, or midshipman of the Reserve Officers Training Corps while attending field training or practice cruises; and •(D) in the case of members of the National Guard or Air National Guard of any State, full-time duty under sections 316, 502, 503, 504, or 505 of title 32, United States Code.

•(3) The term "inactive duty training" means - •(A) duty (other than full-time duty) prescribed or authorized for Reserves (including commissioned officers of the Reserve Corps of the Public Health Service) which duty is scheduled in advance by competent authority to begin at a specific time and place; and •(B) in the case of a member of the National Guard or Air National Guard of any State, such term means duty (other than full-time duty) which is scheduled in advance by competent authority to begin at a specific time and place under sections 316, 502, 503, 504, or 505 of title 32, United States Code.

•(4) The terms "active duty for training" and "inactive duty training" do not include duty performed as a temporary member of the Coast Guard Reserve, and the term "inactive duty training" does not include (A) work

or study performed in connection with correspondence courses, or (B) attendance at an educational institution in an inactive status. •(5) The term "member" means - •(A) a person on active duty, active duty for training, or inactive duty training in the uniformed services in a commissioned, warrant, or enlisted rank, or grade, or as a cadet or midshipman of the United States Military Academy, United States Naval Academy, United States Air Force Academy, or the United States Coast Guard Academy; •(B) a person who volunteers for assignment to the Ready Reserve of a uniformed service and is assigned to a unit or position in which such person may be required to perform active duty, or active duty for training, and each year will be scheduled to perform at least twelve periods of inactive duty training that is creditable for retirement purposes under chapter 1223 of title 10 (or under chapter 67 of that title as in effect before the effective date of the Reserve Officer Personnel Management Act); •(C) a person assigned to, or who upon application would be eligible for assignment to, the Retired Reserve of a uniformed service who has not received the first increment of retirement pay or has not yet reached sixty-one years of age and has completed at least twenty years of satisfactory service creditable for retirement purposes under chapter 1223 of title 10 (or under chapter 67 of that title as in effect before the effective date of the Reserve Officer Personnel Management Act); •(D) a person transferred to the Retired Reserve of a uniformed service under the temporary special retirement authority provided in section 1331a (FOOTNOTE 1) of title 10 who has not received the first increment of retirement pay or has not reached sixty-one years of age; and

(FOOTNOTE 1) See References in Text note below. •(E) a member, cadet, or midshipman of the Reserve Officers Training Corps while attending field training or practice cruises.

•(6) The term "uniformed services" means the Army, Navy, Air Force, Marine Corps, Coast Guard, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration. •(7) The terms "widow" or "widower" means a person who is the lawful spouse of the insured member at the time of his death. •(8) The term "child" means a legitimate child, a legally adopted child, an illegitimate child as to the mother, or an illegitimate child as to the alleged father, only if (A) he acknowledged the child in writing signed by him; or (B) he has been judicially ordered to contribute to the child's support; or (C) he has been, before his death, judicially decreed to be the father of such child; or (D) proof of paternity is established by a certified copy of the public record of birth or church record of baptism showing that the insured was the informant and was named as father of the child; or (E) proof of paternity is established from service department or other public records, such as school or welfare agencies, which show that with his knowledge the insured was named as the father of the child. •(9) The term "parent" means a father of a legitimate child, mother of a legitimate child, father through adoption, mother through adoption, mother of an illegitimate child, and father of an illegitimate child but only if (A) he acknowledged paternity of the child in writing signed by him before the child's death; or (B) he has been judicially ordered to contribute to the child's support; or (C) he has been judicially decreed to be the father of such child; or (D) proof of paternity is established by a certified copy of the public record of birth or church record of baptism

showing that the claimant was the informant and was named as father of the child; or (E) proof of paternity is established from service department or other public records, such as school or welfare agencies, which show that with his knowledge the claimant was named as father of the child. No person who abandoned or willfully failed to support a child during the child's minority, or consented to the child's adoption may be recognized as a parent for the purpose of this subchapter. However, the immediately preceding sentence shall not be applied so as to require duplicate payments in any case in which insurance benefits have been paid prior to receipt in the administrative office established under subsection 1966(b) of this title of sufficient evidence to clearly establish that the person so paid could not qualify as a parent solely by reason of such sentence.

38 § 1970. Beneficiaries; payment of insurance

•(a) Any amount of insurance under this subchapter in force on any member or former member on the date of the insured's death shall be paid, upon the establishment of a valid claim therefor, to the person or persons surviving at the date of the insured's death, in the following order of precedence:

First, to the beneficiary or beneficiaries as the member or former member may have designated by a writing received prior to death (1) in the uniformed services if insured under Servicemen's Group Life Insurance, or (2) in the administrative office established under section 1966(b) of this title if separated or released from service, or if assigned to the Retired Reserve, and insured under Servicemen's Group Life Insurance, or if insured under Veterans' Group Life Insurance;

Second, if there be no such beneficiary, to the widow or widower of such member or former member;

Third, if none of the above, to the child or children of such member or former member and descendants of deceased children by representation;

Fourth, if none of the above, to the parents of such member or former member or the survivor of them;

Fifth, if none of the above, to the duly appointed executor or administrator of the estate of such member or former member;

Sixth, if none of the above, to other next of kin of such member or former member entitled under the laws of domicile of such member or former member at the time of the insured's death. •(b) If any person otherwise entitled to payment under this section does not make claim therefor within one year after the death of the member or former member, or if payment to such person within that period is prohibited by Federal statute or regulation, payment may be made in the order of precedence as if such person had predeceased the member or former member, and any such payment shall be a bar to recovery by any other person. •(c) If, within two years after the death of the member or former member, no claim for payment has been filed by any person entitled under the order of precedence set forth in this section, and neither the Secretary nor the administrative office established by the insurance company or companies pursuant to section 1966(b) of this title has received any notice that any such claim will be made, payment may be made to a claimant as may in the judgment of the Secretary be equitably

entitled thereto, and such payment shall be a bar to recovery by any other person. •(d) The member may elect settlement of insurance under this subchapter either in a lump sum or in thirty-six equal monthly installments. If no such election is made by the member the beneficiary or beneficiaries may elect settlement either in a lump sum or in thirty-six equal monthly installments. If the member has elected settlement in a lump sum, the beneficiary or beneficiaries may elect settlement in thirty-six equal monthly installments. •(e) Until and unless otherwise changed, a beneficiary designation and settlement option filed by a member with the member's uniformed service under prior provisions of law will be effective with respect to the increased insurance authorized under the Veterans' Insurance Act of 1974 and the insurance shall be settled in the same proportionate amount as the portion designated for such beneficiary or beneficiaries bore to the amount of insurance heretofore in effect. •(f) Notwithstanding the provisions of any other law, payment of matured Servicemen's Group Life Insurance or Veterans' Group Life Insurance benefits may be made directly to a minor widow or widower on his or her own behalf, and payment in such case shall be a complete acquittance to the insurer. •(g) Payments of benefits due or to become due under Servicemen's Group Life Insurance or Veterans' Group Life Insurance made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to (1) collection of amounts not deducted from the member's pay, or collected from him by the Secretary concerned under section 1969(a) of this title, (2) levy under subchapter D of chapter 64 of the

Internal Revenue Code of 1986 (26 U.S.C. 6331 et seq.) (relating to the seizure of property for collection of taxes), and (3) the taxation of any property purchased in part or wholly out of such payments. •(h) Insurance payable under this subchapter may not be paid in any amount to the extent that such amount would escheat to a State. Payment of insurance under this subchapter may not be made to the estate of the insured or the estate of any beneficiary of the insured unless it is affirmatively shown that any amount to be paid will not escheat to a State. Any amount to be paid under this subchapter shall be reduced to the extent necessary to comply with this subsection.

38 § 1975. Jurisdiction of District Courts

The district courts of the United States shall have original jurisdiction of any civil action or claim against the United States founded upon this subchapter.

Rule 22. Interpleader

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclairn. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C. §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules

(2)

Supreme Court, U.S.
FILED
DEC 1 1997
CLERK

No. 97-744
In The

Supreme Court of the United States

October Term, 1997

ANNA HINKEL,

Petitioner,

vs.

CURTIS R. HINKEL, and
PRUDENTIAL INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CURTIS R. HINKEL'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding. Prudential Insurance Company was not a party to the issues on appeal to the Eighth Circuit.

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STATEMENT OF THE CASE

The Petition for Writ of Certiorari seeks this Court's review of the 8th Circuit's opinion in ***Prudential Ins. Co. v. Hinkel,*** 121 F.3d. 364 (8th Cir. 1997***).*** The question presented by Petitioner misrepresents the decision made by the 8th Circuit. Petitioner's "question presented" implies that there was some wrongdoing by Respondent, Curtis R. Hinkel, and requests an examination of its "extent". An accurate description of the underlying facts is set forth in the first five sentences of the District Court's decision (Pet. 12a)[1]. Thereafter, the District Court did not make additional findings of fact but rather commented on the legal position and contentions of Respondent, Curtis R. Hinkel.

As set forth herein, there is no cause for this Court to review the "extent of wrongdoing" as there was no wrongdoing to begin with but merely the unfortunate characterization of Mr. Hinkel by the District Judge. These characterizations include:

1. "He can not be perceived as an 'innocent recipient,'" Pet. 19a and 21a;

2. "Granted license to purloin his daughter's inheritance," Pet. 21a;

3. "Would take from his daughter her inheritance to

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[1] The District Court inexplicably ruled in favor of Anna Hinkel although no dispositive motion had been filed by her. A cross-claim filed August 15, 1996 by her (which was after the hearing on August 5, 1996), without leave of court, was rendered "moot" by the District Court's ruling. (Pet. 26a.)

fill his own pockets," Pet. 23a;

4. "Relying on no equity or fairness," Pet. 23a;

5. "Went for greed," Pet. 24a.

THE FACTS

1. Gail E. Hinkel died on August 26, 1995.

2. At the time of Gail E. Hinkel's death she was insured under Group Policy No. G-32000, issued by Prudential Insurance Company of America to the Administrator of Veterans' Affairs for life coverage, in the amount of $200,000.00.

3. Gail E. Hinkel designated Curtis R. Hinkel as the sole principal beneficiary under the terms of such policy on the Serviceman's Group Life Insurance election and certificate, form SGLV-8286.

4. Curtis R. Hinkel made claim to the proceeds of the life insurance policy insuring the life of Gail E. Hinkel.

DISCUSSION

There were no other facts submitted, by affidavit or deposition, that would support the characterizations of Mr. Hinkel by the District Court. The record discloses no wrongdoing by Mr. Hinkel. Petitioner does not identify any wrongdoing at any place in the Petition. [2] As best as can be

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[2] Nothing was identified as wrongdoing by the District Court even

discerned, the "wrongdoing" by Curtis R. Hinkel is that he made a claim to the policy proceeds based on the statutory language of the Servicemen's Group Life Insurance Act, 38 U.S. C. 1965 *et. seq.* (SGLIA) and under the holding of ***Ridgway v. Ridgway,*** 454 U.S. 46, 102 S.Ct. 49, 70 L. Ed. 2d. 39 (1981). How making a claim to the policy proceeds, premised on statutory authority and case law precedent, constitutes wrongdoing, is not explained nor addressed in the Petition.

ARGUMENT

The provisions of a Divorce Decree and related agreement or stipulation do not effect a change of beneficiary of a life insurance policy issued pursuant to the Servicemen's Group Life Insurance Act of 1965. ***Ridgway v. Ridgway, supra.***

Paragraph 1.1 of the Stipulation states that the provisions of the Stipulation are to be approved by the Court. In the absence of the granting of a Decree of Dissolution, the provisions of the Stipulation were to have no force or effect. The Decree entered November 17, 1993, at Paragraph 6, approves the Stipulation and incorporates it as part of the Decree.

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though it stated Donna Ridgway "was, for lack of a better term, an 'innocent recipient' of the life insurance proceeds" (Pet. 19a). Donna Ridgway had no obligations to support her deceased husband's children from a prior marriage who made claims adverse to her. Mr. Hinkel has legal custody of his daughter, Anna Hinkel, and is obligated for her support. Iowa Code Section 597.14. It is unclear why the District Court perceived Donna Ridgway an "innocent recipient" and Curtis R. Hinkel as something other than an "innocent recipient".

Respondent, Curtis R. Hinkel, respectfully contends that the Stipulation and Decree do not nullify, modify, nor reduce the effect of ***Ridgway***. When the arguments of Petitioner are analyzed , they reveal nothing more than a breach of contract claim (state law claim) by Anna Hinkel against her mother's Estate. Anna Hinkel is a third-party beneficiary of the provisions of the Stipulation. The Stipulation and Decree are enforceable under state law. A state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments. ***McCarty v. McCarty***, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981) which is cited in ***Ridgway*** at 454 U.S. 54-55, 102 S.Ct. 54-55, 70 L.Ed.2d _____ (1981). The clearly conflicting federal enactment is the statutory scheme of the Servicemen's Group Life Insurance Act, 38 U.S.C. §1965-1979.

Gail Hinkel, as the insured service member, possessed the right to freely designate her beneficiary and to alter that choice at any time by communicating the decision in writing to the proper office. She failed to make any change in beneficiary. She possessed the right to change or not change her beneficiary. She had approximately twenty-one (21) months from the date the Divorce Decree was entered until the time of her death to change her beneficiary. She failed to do so. Her intention to change her beneficiary, as presumably expressed in the Divorce Stipulation, was insufficient to effect such change. Gail Hinkel was required to perform some overt act directed to carrying out her intention. As stressed by the Eighth Circuit Court of Appeals in ***Benard v. United States***,

368 F.2d 897, 901 (1966)[3], in addition to her intent, there must be proof that she did, by way of an affirmative act, all that could reasonably have been expected of her under the existing circumstances to effectuate her intention to change her beneficiary. In the present case, there was no "proof" that she performed any affirmative act.

An understanding of ***Ridgway v. Ridgway***, ***supra***, ***Wissner v. Wissner***, 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424 (1950)[4], and ***Yiatchos v. Yiatchos***, 376 U.S. 306, 84 S.Ct. 742, 11 L.Ed.2d 724 (1964) is sufficient for this Court to reject the claims of Petitioner. Her claims are entirely based on the Stipulation and Decree entered in the dissolution proceedings. The arguments being made to support her claim fail to address the concept that Gail Hinkel was unable to contract or give away her right to designate her beneficiary. She could not assign nor convey that right. She was unable to make good on a promise to make a specific person a beneficiary without actually completing the necessary designation form. She could not waive her right to designate the beneficiary. She was unable to accomplish all of the foregoing because of the provisions of the Servicemen's Group Life Insurance Act, 38 U.S.C. §§ 1965-1979.

If Gail Hinkel was unable to contract away her right to designate a beneficiary, or promise to make a particular person her beneficiary, the insurance policy was, accordingly, not

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[3] This decision concerned a United States Government life insurance (USLI) policy issued pursuant to 38 U.S.C. § 740 *et. seq*

[4] This decision concerned a National Service Life Insurance (NSLIA) policy issued pursuant to 38 U.S.C. § 801, *et seq*. The NSLIA was the predecessor to the SCLIA. ***Ridgway v. Ridgway***, 454 U.S. 50, 102 S.Ct. 55, 70 L.Ed.2d ___.

affected by the Stipulation and Decree in the dissolution matter and any claim by Curtis R. Hinkel to the proceeds of the life insurance policy is also not affected by the Stipulation and Decree entered in the dissolution proceedings. Curtis R. Hinkel is the appropriate beneficiary under 38 U.S.C. § 1970. As stated previously herein, "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." This "principle is but the necessary consequence of the Supremacy Clause of our National Constitution." ***Ridgway***, 454 U.S. 55, 102 S.Ct. 55, 70 L.Ed.2d ____. The Stipulation signed by Gail Hinkel and Curtis R. Hinkel and the Decree approving the Stipulation have no effect on the precedent established in ***Ridgway***.

There is no distinction to be made when the recipient was a party to the divorce. ***Taylor v. United States,*** 459 F.2d 1007 (9th Cir.), *cert. denied*, 409 U.S. 967, 93 S.Ct. 273, 34 L. Ed. 2d 232 (1972). ***Taylor*** involved an NSLIA life insurance policy in which the ex-wife was determined to be the legal beneficiary of the policy proceeds. The 9th Circuit, in commenting on the divorce documents, said, at 459 F.2d. 1009:

> **If (the ex-wife) relinquished anything concerning the insurance, it was as to any claim against (the ex-husband) but not her claim against the insurer, the United States.**

Respondent, Curtis R. Hinkel, is in the same position. He has not relinquished any claim he has against the issuer of the policy but merely any claims he may have had against Gail Hinkel. Petitioner makes no attempt to fully describe the

status of Curtis R. Hinkel, regarding his claim to the life insurance proceeds, and how his claim to the proceeds constitutes "wrongdoing". There is no authority for Petitioner's arguments. In ***Andrews v. Andrews,*** 97 F.2d 485 (8th Cir. 1938) a divorce did not bar the ex-wife from recovering the proceeds of three life insurance policies. The Court noted that there was nothing in the property settlement contract that showed an intent by the ex-wife to give up any rights that might accrue to her as beneficiary. The interest of the ex-wife was contingent until the time of the death of Mr. Andrews. Up until his death, Mr. Andrews had the right to make a change in the beneficiary in such life insurance policies. At 97 F.2d. 487-88 the Court said:

> **We must assume that he knew that the death benefits in the policies here involved would, unless he changed the name of the beneficiary, go to (ex-wife). With this knowledge, he not only refrained from making any change, but he continued to pay the premiums.**

Petitioner's "wrongdoing" arguments, concerning Curtis R. Hinkel, also overlook other decisions in which "wrongdoing" has, under Petitioner's theory, taken place. In ***McCollum v. Sieben,*** 211 F.2d 708 (8th Cir. 1954) the Circuit Court decided the question of the appropriate beneficiary of an NSLIA policy. At 211 F.2d 712 the Court held that even if the property settlement and divorce proceedings support an inference that the insured intended to change the beneficiary in the policies, it was not enough to comply with the law. Evidence of intention to change beneficiaries without some accompanying affirmative act, "is insufficient to effect a change of beneficiary and the courts cannot act when (the

insured) has not first attempted to act for himself." (Citing ***Bradley v. United States***, 143 F.2d 573, 576 (10th Cir.), *cert. denied*, 323 U.S. 793, 65 S.Ct. 429, 89 L.Ed. 632 (1945).)

In ***Fitzstephens v. United States,*** 189 F.Supp. 919 (D. Wyo. 1960) the Court ruled in favor of the ex-wife on a NSLIA policy where she had been designated beneficiary prior to the divorce. No change had been made in the beneficiary designation. The ruling in her favor was made despite a property settlement agreement stating, in part:

> **4. The following property shall be the sole, separate and absolute property of Donald:**
>
> . . .
>
> **All life insurance on the life Donald and all corporate savings plans heretofore earned by him.**
>
> **7. Each party hereby releases the other from all rights or claims of whatever kind growing out of their marital relationship except as herein provided.**

189 F.Supp. 920.

There is nothing in the decision which would indicate that the claim by the ex-wife was "wrongful" or constituted "wrongdoing". It appears that the ex-wife was treated as a lawful claimant making a claim under a contract of insurance as the principal beneficiary. No fingers were pointed at her with some inference that what she was doing was "wrongful".

The 6th Circuit Court of Appeals, in resolving conflicting claims under an NSLIA policy, ruled in favor of an ex-wife, the designated beneficiary, despite a Michigan law

providing that, upon entry of a divorce decree, "all rights of the wife in and to the proceeds of any policy or contract of life insurance, . . . upon the life of the husband in which she was named or designated as beneficiary, ... during the marriage . . . shall thereupon become and be payable to the estate of the husband". ***United States v. Donall,*** 466 F.2d. 1246, 1247. fn2 (6th Cir. 1972). Also, a Divorce Decree had been entered, which provided:

> **It is further ordered, adjudged and decreed, that all rights of either party in and to the proceeds of any policy or contract of life insurance . . . upon the life of the other party, in which he or she was named or designated as beneficiary, ... are hereby cut off and at an end. 466 F.2d. 1247, fn3.**

No mention was made that the claim of the ex-wife was somehow "wrongful". Again, it appears that her claim was based on the fact that she was the lawful beneficiary of a life insurance policy. The ex-wife was the principal beneficiary and the deceased's mother was the contingent beneficiary. The mother claimed the proceeds on the basis of the Michigan law and on the basis of the Divorce Decree. No claims where made that the ex-wife was a "wrongdoer".

Petitioner argues, in the "Conclusion" (Pet. 10) that Curtis R. Hinkel fits the definition of a "wrongdoer". The Petition makes reference to the ***Ridgway v. Ridgway, supra,*** and specifically footnotes 9 and 12.

Footnote 9 concerns the decision in ***Shoemaker v. Shoemaker,*** 263 F.2d. 931 (6th Cir. 1959) in which the beneficiary murdered the insured service member. Footnote

12 refers to "wrongdoing by the named beneficiary". As stated previously herein, there has been no "wrongdoing" by Curtis R. Hinkel. He has made a valid claim, as the primary designated beneficiary, to the proceeds of the life insurance policy insuring the life of Gail E. Hinkel. His signature on the appropriate claim form (Form No. SGLV B 8286), does not constitute "wrongdoing". By signing his name he can not be perceived to have done any "wrong" such as the beneficiary did in ***Shoemaker.***

REASONS FOR DENYING THE WRIT

The Petition requests review of the "extent of wrongdoing" by a named beneficiary under an SGLIA Policy. The difficulty with this is that there has been no wrongdoing that Petitioner can point to. The Petition is a veiled attempt to have Anna Hinkel's state law Breach of Contract Claim recognized. The claims of "wrongdoing" have no support in the record. Moreover, the 8th Circuit Court of Appeals found that there was "no genuine issue of material fact" and that Curtis R. Hinkel was entitled to judgement as a matter of law. (Pet. 10a.) Further, the issue of the appropriate beneficiary under an SGLIA Policy of life insurance has been definitively answered in ***Ridgway v. Ridgway, supra***. The decision by the 8th Circuit was a correct application of settled law, and no conflict among the Circuits is even suggested.

In addition, the claim of the Petitioner, based on the findings of the District Judge, is meritless to the extent that it is based on the District Judge's characterizations rather than factual findings. There is absolutely no way to change a beneficiary under an SGLIA Policy unless the change has been made in writing and made to the proper office. Such change

was never accomplished by Gail E. Hinkel. To allow a change, as now urged by Petitioner, would be contrary to the statutory scheme and regulations now in place and recognized in ***Ridgway v. Ridgway, supra,*** and followed by the 8th Circuit of Appeals in ***Prudential Ins. Co. v. Hinkel, supra***.

CONCLUSION

Petitioner has failed to establish any factual basis for "wrongdoing" or "wrongful" act by Respondent, Curtis R. Hinkel. The characterizations of Mr. Hinkel by the District Judge are unfounded. The issue in this matter is definitively resolved by this Court's decision in ***Ridgway v. Ridgway, supra.***. No reasons are present in this case to overturn or distinguish ***Ridgway.*** This case is absolutely controlled by ***Ridgway*** in that the insured, Gail E. Hinkel, at all times possessed the right freely, without being bound by any contractual obligations whatsoever (be they divorce-related or otherwise), to designate the beneficiary of her SGLIA Policy and to alter that choice at any time by communicating the decision in writing to the proper office. 454 U.S. 56, 102 S.Ct. 55, 70 L. Ed. 2d. _____. The converse is also true in that she had the right to not alter her choice if she so desired despite any divorce-related documents in which she agreed otherwise.

The 8th Circuit decision in ***Prudential Ins. Co. v. Hinkel, supra,*** is not in conflict with the decision of another United States Court of Appeals. The decision does not conflict with a decision by a State Court of last resort. The decision does not depart from the accepted and usual course of Judicial proceedings. Further, the decision of the 8th Circuit of Appeals concerns an issue that has been previously settled by

this Court and does not, in any manner whatsoever, conflict with any relevant decisions of this Court.

The Petition should be denied for all of the reasons set forth in this Brief in Opposition.

DATED: November 26, 1997.
Respectfully submitted,

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